REEMPLOYMENT RIGHTS OF RECALLED RESERVISTS

By Capt. Samuel F. Wright, JAGC, U.S.N.R.

For the second time since the fall of the Berlin Wall, a president named Bush has found it necessary to recall to active duty tens of thousands of National Guard and Reserve personnel, causing many to leave their jobs and sometimes casting their benefit programs into question. The federal law that covers reemployment rights for veterans affected by mobilization (the VRR, or Veterans Reemployment Rights statute) dates back to August 1940.[1] That was before former President Bush became a decorated naval aviator, and before the current President Bush was born. The federal reemployment statute was substantially modified and recodified in 1994 as the Uniformed Services Employment and Reemployment Rights Act (USERRA).[2]

Under the act, individuals who leave a civilian job for voluntary or involuntary service in the uniformed services[3] are entitled to reemployment in the preservice job after service if they meet the following eligibility criteria:

1. Left the civilian job for the purpose of service and gave notice to the civilian employer.[4]
2. Period of service did not exceed five years, cumulatively, with that employer.[5]
3. Released from active duty under honorable conditions.[6]
4. Reported back to work in a timely manner or made a timely application for reemployment after release from service.[7]

Qualified individuals are entitled to receive prompt reinstatement and must be treated, for seniority and pension purposes, as if they had been continuously employed.[8] They also are entitled to immediate reinstatement of health insurance coverage under the employer's plan. Waiting periods and exclusions due to preexisting conditions are prohibited.[9]

USERRA applies to federal, state, and local governments and to private employers. It applies even to very small employers—having merely one employee makes one an "employer."[10] The law applies all over the world to U.S. and U.S.-affiliated companies[11] and to construction workers and others who work for a group of employers through hiring halls or similar operations.[12]

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Claims under USERRA must be made in writing to the Veterans' Employment and Training Service (VETS), Department of Labor.[13] VETS investigators can require the attendance and testimony of witnesses and the production of documents.[14] The investigation initially tries to secure voluntary compliance from the employer.[15]

If the complaint is not resolved, the claimant can request that the case be referred to the Attorney General if the employer is a state, political subdivision of a state, or a private employer,[16] or to the Special Counsel if the employer is a federal executive agency.[17] The Attorney General or the Special Counsel ultimately can bring suit on behalf of the claimant.[18]

If the claim reaches this stage and the defendant is a state, a political subdivision of a state, or a private employer, the forum is the appropriate federal district court.[19] If the defendant is a federal executive agency, the forum is the Merit Systems Protection Board (MSPB).[20] Cases involving a state are brought by the Attorney General in the name of the United States.[21] In all other cases, the named plaintiff is the individual claimant.[22]

There is no requirement to "exhaust remedies" through VETS, the Attorney General, or the Special Counsel prior to initiating a legal action in federal district court or the MSPB. If the claimant proceeds through private counsel and prevails, the court or the MSPB may award attorneys' fees and litigation expenses as part of the remedy.[23] The remedy will also include a court order requiring the employer to comply with USERRA and to compensate the plaintiff for wages and benefits lost because of the employer's violation.[24] Back pay is computed according to pay periods and for comparable hours.[25] If the court finds that the employer's violation was willful, the court can double the back-pay award.[26]

USERRA does not contain a statute of limitations, and it specifically precludes the application of state statutes of limitations.[27] If employers can show that the plaintiffs inexcusably delayed in asserting their rights and that the employer was thereby prejudiced, the court can dismiss the case under the equitable doctrine of laches.[28]

USERRA does not supersede any employer policy, contract, or state law that provides greater or additional rights.[29] It does, however, supersede state laws, ordinances, contracts, and policies that purport to limit federal rights or to impose additional eligibility criteria.[30]

The reemployment statute should be "liberally" construed for the benefit of those who have laid aside their civilian pursuits to serve our country.[31] For those voluntarily or involuntarily "called to the colors" for an emergency such as the one we are currently facing, the status of their civilian jobs should be the least of their worries.

Notes

A similar version appeared in the December 2001 issue of the *ABA Journal*.

The views expressed in this article are the personal views of the author and do not necessarily represent the views of the Departments of Defense, Navy, Labor (DOL), or the U.S. government.

1. *See* S.J. Res. 76-286, 54 Stat. 858.
2. Pub. L. No. 103-353, 108 Stat. 3149 (codified at 38 U.S.C. §§ 4301-4333). The website of the Reserve Officers Association (ROA) has a series of "Law Review" articles about USERRA and related laws, available at http://www.roa.org.
3. The term "service in the uniformed services" is defined in 38 U.S.C. §§ 4303(13), (16). The definition specifically includes voluntary as well as involuntary service in the Army, Navy, Marine Corps, Air Force, Coast Guard, and the commissioned corps of the Public Health Service. The commissioned corps of the National Oceanic and Atmospheric Administration qualifies as a "uniformed service" for other legal purposes but is not covered by USERRA. During a time of war or national emergency, the president can designate any other category of persons to be a "uniformed service" for USERRA purposes. *See* 38 U.S.C. § 4303(16) (final phrase). Members of the Army National Guard and Air National Guard have USERRA rights when they perform active duty for training, inactive duty training, and "full-time National Guard duty" (which is not defined in USERRA but in 10 U.S.C. § 101 and 32 U.S.C. § 101. The definition is based on the receipt of orders that cite one of certain enumerated sections in Title 10 and Title 32. Most National Guard members currently serving on full-time duty to provide airport security received orders that cite 32 U.S.C. § 502, one of the enumerated sections. Thus, those National Guard members are protected by USERRA. National Guard members on "purely state" orders do not have rights under USERRA, but they may be protected by state law.
4. *See* Law Review Number 5, *supra* note 2.
5. Certain categories of service are exempt from the five-year limit. *See Id.* at Number 6.
6. *See id*.
7. *See id*. at Number 7.
8. *See id.* at Numbers 4, 8, & 9.
9. *See id*. at Number 10.
10. *See* Cole v. Swint, 961 F.2d 58, 60 (5th Cir. 1992).
11. *See* Law Review Number 24, *supra* note 2.
12. *See id*. at Number 28.

13. *See* 38 U.S.C. 4322(a). VETS agents are listed by region at http://www.dol.gov/dol/vets. Also check the blue (government) pages of your local telephone directory under Department of Labor, Veterans' Employment and Training.
14. *See* 38 U.S.C. § 4326(b).
15. Also helpful is the DOD's National Committee for Employer Support of the Guard and Reserve (ESGR), available at http://www.esgr.org or 800/336-4590, which works with employers of Reserve and National Guard personnel to resolve misunderstandings. ESGR also gets the word out to employers via public service announcements, "boss lifts," and other communications and sponsors an awards program for particularly cooperative employers.
16. *See* 38 U.S.C. § 4323(a).
17. *Id.* 5 U.S.C. § 1211 establishes the Special Counsel.
18. *See* 38 U.S.C. § 4323(a)(1) (Attorney General); § 4324(a)(2)(A) (Special Counsel).
19. *See* 38 U.S.C. § 4323(b).
20. *See* 38 U.S.C. § 4324(a)(2)(A).
21. *See* 38 U.S.C. § 4323(a)(1). Political subdivisions of states are treated as private employers. *See* 38 U.S.C. § 4323(j). Individuals can file suit (through retained private counsel) against a state, as the employer, in a state court of competent jurisdiction, in accordance with state laws. *See* 38 U.S.C. § 4323(b)(2). Some states limit suits by sovereign immunity.
22. *See* 38 U.S.C. § 4323(a)(1), § 4324(a)(2)(A).
23. *See* 38 U.S.C. § 4323(h)(2), § 4324(c)(4).
24. *See* 38 U.S.C. § 4323(d)(1)(A), (B); § 4324(c)(2).
25. *See* Dyer v. Hinky Dinky, Inc., 710 F.2d 1348 (8th Cir. 1983); Helton v. Mercury Freight Lines, Inc., 444 F.2d 365 (5th Cir. 1971).
26. *See* 38 U.S.C. § 4323(d)(1)(C). The provision allowing doubling applies to state and local governments and private employers. It does not apply in cases against the federal government as a civilian employer.
27. *See* 38 U.S.C. § 4323(I).
28. *See* Gruca v. U.S. Steel Corp., 495 F.2d 1252, 1258 (3rd Cir. 1974).
29. *See* 38 U.S.C. § 4302(a).
30. *See* 38 U.S.C. § 4302(b).
31. Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 285 (1946).